# Supreme Court of the United States

**October Term, 1962**



**No. 119**

WILLIAM J. MURRAY, III, Infant, etc., *et al.*,
*Petitioners,*

*against*

JOHN N. CURLETT, *et al.* and BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY,
*Respondents.*

**No. 142**

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, *et al.*,
*Appellants,*

*against*

EDWARD LEWIS SCHEMPP, *et al.*,
*Respondents.*

## BRIEF OF AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICI CURIAE*

MORRIS B. ABRAM
EDWIN J. LUKAS
New York, New York
*Attorneys for*
*American Jewish Committee*
165 East 56th Street
New York 22, New York

BURNETT ROTH
Miami, Florida
ARNOLD FORSTER
New York, New York
*Attorneys for*
*Anti-Defamation League of B'nai B'rith*
515 Madison Avenue
New York 22, New York

*Amici Curiae*

PAUL HARTMAN
THEODORE LESKES
SOL RABKIN
New York, New York
*Of Counsel*

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

***Cases:***

***Statutes:***

***Other Authorities:***

# Supreme Court of the United States

**October Term, 1962**

**No. 119**

WILLIAM J. MURRAY, III, Infant, etc., *et al.*,
*Petitioners,*

*against*

JOHN N. CURLETT, *et al.* and BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY,
*Respondents.*

**No. 142**

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, *et al.*,
*Appellants,*

*against*

EDWARD LEWIS SCHEMPP, *et al.*,
*Respondents.*

## BRIEF OF AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICI CURIAE*

### Interest of the *Amici*

The American Jewish Committee, founded in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. Its Charter states:

> The objects of this corporation shall be, to prevent the infraction of the civil and religious rights of Jews,

> in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto * * *

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a membership of more than 350,000 men and women and their families. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance goodwill and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It is, therefore, dedicated to the protection of freedom of religion and combatting religious discrimination.

It has been among the fundamental tenets of the organizations which appear as *amici curiae* herein that the welfare and the security of members of minority religious groups in the United States depend upon the preservation of constitutional guarantees for all; that an invasion of the rights of any religious group is ultimately a threat to the religious freedom of all groups and to the individual members thereof.

These cases place in issue the constitutionality under the First and Fourteenth Amendments of Bible-reading and the recitation of the Lord's Prayer as part of the daily opening exercises in public schools in Baltimore and Pennsylvania.

The constituencies of both of the *amici* include vast numbers of people who not only believe deeply in the existence of God but devoutly worship Him. Our children receive their religious instruction and observe their religious

ceremonies at home, in the synagogues and religious schools, since we believe that religious exercises and activities in our pluralistic society are matters for the home, synagogue and church, and not for the public schools. We wholeheartedly support the principle of separation of church and state as expressed in the First Amendment to the United States Constitution and interpreted by this Court, for the greater independence and strength of both those institutions.

Paul Hutchinson, one-time editor of *Christian Century*, made the following perceptive comment on the significance of separation of church and state in the United States as a source of strength for the institutions of religion:

> • • • there has been no "establishment of religion," no state church with tax support, no interlocking of the official machinery of the church with the official machinery of the government. The churches have been on their own, growing by their own efforts—which largely accounts for that interest in revivalism and "activism" that has exposed them to criticism from European churches under no necessity to support themselves.
>
> This is something unknown in organized Christianity since the edict of Theodosius I in 380 A.D. made political loyalty and membership in the Christian church virtually synonymous. For 1,400 years after that, membership in the church and in the state was regarded as two aspects of the same thing—which was one reason for brutal treatment of the Jews. This was as true in the Protestant states which emerged from the Reformation as in the Catholic monarchies. But the United States, from its infancy as a nation, returned to the conception of the Christian church as it was before Constantine, when men joined of their

> own free will and supported it of their own voluntary desires, and the Church in consequence was a free institution. Judged by what has followed, the American adoption of the principle of church and state separation has been a godsend for the churches, Protestant, Roman Catholic and of every sort. The voluntary principle has gained, in the friendly American climate, an impressive pragmatic sanction. Hutchinson, Paul, "The Onward March of Christian Faith," *Life* Magazine, December 26, 1955, 43.

As organizations of persons professing a minority religious faith, we are particularly concerned with religious practices in the public schools which are consonant with and reflect the religious beliefs of the majority.

State agencies, by mandating prayer and Bible-reading as part of the opening exercises in the public schools, sought to satisfy the demands of those who insist on the introduction of religious practices in the public schools, concededly out of good motives. The *amici curiae*, however, believe that a state agency is not equipped, qualified or competent to evaluate the spiritual needs of the students attending public schools or to establish the means to satisfy such needs.

Any attempt by public school authorities to provide for religious needs of children committed to their care must necessarily involve them in such tormenting and divisive questions of doctrine and dogma as, for example, deciding which version of the Bible ought to be used and which passages should and which should not be read.

Any decision legalizing religious ceremonies in the public schools must inevitably open a Pandora's box of problems for those school authorities who are, as they

should be, conscious of the religious sensibilities of the children entrusted to their care.

Freedom of religious belief, observance and worship can remain inviolate only so long as there is no intrusion of religious authority in secular affairs or secular authority in religious affairs. Each breach in this separation of role and function tends to beget additional breaches and, hence, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith are opposed to any and all forms of establishment of religion by which a state agency undertakes to provide for the religious needs of children.

For these reasons, the two organizations join in filing this brief *amici curiae* with the permission of this Court.

## Statement of the Case

### a. *Murray* v. *Curlett*, No. 119

William J. Murray, III, a student attending Woodbourne Junior High School in the City of Baltimore, and his mother, commenced this action in the Superior Court of Baltimore City for a writ of mandamus to bar from the public schools of that city "the reading without comment of a chapter in the Holy Bible and/or the use of the Lord's Prayer." That practice is required as part of the opening exercise in the public schools by a regulation of the Board of School Commissioners of Baltimore. Adopted originally in 1905, it read as follows:

> Opening Exercises. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the

> use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it. Appropriate patriotic exercises should be held as a part of the general opening exercise of the school or class. Rules of the Board of School Commissioners, Article VI, Section 6.

On November 17, 1960, the Board amended the aforesaid regulation by adding the following sentence:

> Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon written request of his parent or guardian.

The petitioners contended that the regulation, both originally and as amended, contravened their freedom of religion under the First and Fourteenth Amendments of the United States Constitution in that it violated the principle of separation between church and state.

The Superior Court of Baltimore City dismissed the petition on demurrer and the petitioners appealed to the Court of Appeals of Maryland. That Court affirmed the lower court ruling by a four-to-three decision, holding that "the daily opening exercises of the Baltimore City public schools—wherein the Holy Bible is read and the Lord's Prayer is recited"—did not violate plaintiffs' constitutional rights. *Murray* v. *Curlett*, 228 Md. 239 (1962).

This Court granted the petition for a Writ of Certiorari on October 8, 1962. —— U. S. ——.

**b. *School District of Abington Township v Schempp*, No. 142**

Mr. & Mrs. Edward Lewis Schempp, as parents and natural guardians of three children attending the public schools in Abington Township, Pennsylvania, commenced this action in the Federal District Court for the Eastern District of Pennsylvania. They attacked the constitutionality of a statute of the Commonwealth of Pennsylvania which read as follows:

> At least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at the opening of each public school on each school day, by the teacher in charge; Provided, That where any teacher has other teachers under and subject to direction, then the teacher exercising such authority shall read the Holy Bible, or cause it to be read, as herein directed.
>
> If any school teacher, whose duty it shall be to read the Holy Bible, or cause it to be read, shall fail or omit so to do, said school teacher shall, upon charges preferred for such failure or omission, and proof of the same, before the board of school directors of the school district, be discharged. 24 P. S. Pa. Sec. 15-1516

The complaint alleged that the statute is unconstitutional as an establishment of religion and a prohibition of the free exercise thereof. The complaint also alleged that the practice as followed in the public schools of Abington Township of reciting the Lord's Prayer in conjunction with the reading of the ten verses of the Holy Bible, is unconstitutional for the same reasons. It sought a declaratory judgment and injunction against the practices complained of. A three-judge court was convened pursuant to 28 U. S. C.,

Secs. 2281, 2284. It unanimously declared the Pennsylvania statute unconstitutional under the Establishment and Free Exercise Clauses of the First Amendment. It also struck down as unconstitutional, on the same grounds, the combined practice of Bible-reading and mass recitation of the Lord's Prayer by students in the public schools of Abington Township. *Schempp* v. *School District of Abington Township*, 177 F. Supp. 398 (1959).

The School District of Abington Township appealed to this Court. While that appeal was pending, the General Assembly of Pennsylvania enacted Act No. 700, Laws of 1959, which became effective on December 17, 1959. That Act amended 24 P. S. Pa. Sec. 15-1516 to read as follows:

> At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.

After the enactment of that amendment, this Court on October 24, 1960, in a *per curiam* opinion vacated the Federal District Court judgment and remanded the case to that Court "for such further proceedings as may be appropriate in light of Act No. 700 . . ." *School District of Abington Township* v. *Schempp*, 364 U.S. 298 (1960).

Following a new hearing, the 3-judge court declared the Pennsylvania statute, as amended, unconstitutional. In contrast to its first decision which relied on both the Establishment and the Free Exercise Clauses of the First Amendment, the second decision of the District Court was based exclusively on the Establishment Clause. It further struck down as unconstitutional under the Establishment Clause the combined practice of Bible-reading and mass

recitation of the Lord's Prayer by students in the public schools. *Schempp* v. *School District of Abington Township*, 201 F. Supp. 815 (1962).

The School District again appealed to this Court which, on October 8, 1962, noted probable jurisdiction and set the case for argument immediately following the argument in *Murray* v. *Curlett*, —— U.S. ——.

## The Question Presented

These cases present this Court with the question whether readings from the Holy Bible and the recitation of the Lord's Prayer, conducted by school authorities as part of the opening exercises at the beginning of each school day in the public schools of the City of Baltimore and the Commonwealth of Pennsylvania, constitute an establishment of religion in violation of the First and Fourteenth Amendments of the United States Constitution. Since the practices are based on a school board regulation in one case and a state statute in the other, the constitutionality of such regulation and statute are necessarily drawn in question.

These cases do not question the propriety or constitutionality of the use of the Bible in the teaching of secular subjects which are part of the regular school curriculum.

## Summary of Argument

Reading of a chapter or ten verses from the Holy Bible without comment and the recitation of the Lord's Prayer, conducted by the school authorities as part of the opening exercises in the public schools of Baltimore and Pennsylvania, is a religious and sectarian exercise. Such exercises, because of their form, regularity, absence of comment and other surrounding circumstances, are vested with a ceremonial significance which has the effect of creating a religious atmosphere and religious expression. Such atmosphere and expression, in these cases, are essentially Christian.

The use of the Holy Bible in those exercises must not be confused with its use as a source or reference book in the teaching of secular subjects such as literature, history, art and social studies.

The Establishment Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment, prohibits public school authorities from sponsoring or conducting religious exercises in such schools. *A fortiori*, religious practices which are sectarian are also barred. State statutes and administrative regulations which require such practices to be conducted in the public schools are unconstitutional, whether or not provision is made for the excuse of children who, or whose parents, object to the practice on the grounds of conscience.

Manifestations of belief in God in our public life, such as the invocation of God's blessings at the commencement of legislative sessions and court proceedings are not involved in the cases at bar.

A number of state court decisions, which uphold public school practices similar to those in issue here, are based on fallacious reasoning.

# ARGUMENT

## POINT I

**The daily reading of a chapter or of ten verses of the Holy Bible, without comment, and the recitation of the Lord's Prayer in the public schools of Baltimore and Pennsylvania, is a religious and sectarian ceremony.**

### A. Recitation of the Lord's Prayer

The Lord's Prayer is a portion of the New Testament. It is found in the Gospel according to St. Matthew, Chapter 6, Verses 9-13, as part of the Sermon on the Mount.[1] In the Sermon, Jesus prescribed what is now known as the Lord's Prayer as a prayer for his followers.

The form of the Lord's Prayer, which appears in the King James version of the Holy Bible, originally published in 1611 and generally accepted as the Protestant version, reads as follows:

> Our Father which art in heaven, Hallowed be thy name.
> Thy kingdom come. Thy will be done in earth, as it is in heaven.
> Give us this day our daily bread.
> And forgive us our debts, as we forgive our debtors.
> And lead us not into temptation, but deliver us from evil: For thine is the kingdom, and the power, and the glory, for ever. Amen.

The Lord's Prayer, as it appears in the *Book of Common Prayer* used by the Protestant Episcopal Church in the United States, generally follows the King James ver-

1. An abbreviated form of the Lord's Prayer is also found in the Gospel according to St. Luke 11.2-4.

sion except that it substitutes "trespasses" for "debts" and "those who trespass against us" for "our debtors."[2]

The version of the Lord's Prayer used by Roman Catholics appears in their prayer books as follows:

> Our Father, who art in heaven, hallowed be Thy name: Thy kingdom come: Thy will be done on earth as it is in heaven. Give us this day our daily bread: and forgive us our trespasses as we forgive those who trespass against us. And lead us not into temptation: but deliver us from evil. Amen.
>
> Jehlicka, Rev. Dr. Francis, *Graded Catechism*, William N. Sadler, New York, 1925 (Imprimatur: Patrick Cardinal Hayes, Archbishop, New York) 231.

This version of the Lord's Prayer is derived from the Gospel according to St. Matthew[3] as it appears in the Douay version of the Holy Bible which was originally published by the English Colleges at Rheims and Douay in 1582 and 1609, respectively, and which is the officially accepted Roman Catholic version. A conspicuous difference between the Protestant and Catholic versions of the Lord's Prayer is the absence in the latter of the doxology.[4]

Although some of the language in the Lord's Prayer may be traceable to Jewish sources, the prayer "is a Christian rather than a Jewish prayer." 7 *Universal Jewish Encyclopedia* 193. In fact it is probably the best known and most widely used Christian prayer.

---

2. *Book of Common Prayer*, according to the use of the Protestant Episcopal Church in the United States of America, printed for and presented by the New York Bible and Common Prayer Book Society, Oxford University Press, New York (1935) 7 and 587.

3. As in the King James version of the Bible, an abbreviated form of the Lord's Prayer also appears in the Douay Bible in the Gospel according to St. Luke 11.2-4.

4. "For thine is the kingdom, and the power, and the glory."

The Gospel according to St. Matthew, where the Lord's Prayer originally appeared, like the balance of the New Testament, is not accepted by Jews as part of their Holy Scriptures. The divinity of Jesus, on which Christianity is based, and which explains the designation of the prayer as the "Lord's Prayer," is rejected by Jews. 3 *Universal Jewish Encyclopedia* 486. The very context in which the Lord's Prayer appears in the Gospel according to St. Matthew shows that it was propounded by Jesus and expressly distinguished from the customary prayers offered in the synagogues of the Holy Land at that time.

In *Doremus v. Board of Education* the Supreme Court of New Jersey described the Lord's Prayer as "enjoined by Christ as an appropriate form of prayer." It conceded that the prayer is used by Roman Catholics and Protestants, though "with slight variations." The Court went on to suggest that the Lord's Prayer could or should also be acceptable to Jews because "Christ was a Jew and He was speaking to Jews." *Doremus* v. *Board of Education*, 5 N. J. 435, 450, 451 (1950), appeal dismissed 342 U. S. 429 (1952). The Court overlooked the fact that, in contrast to Protestants and Roman Catholics, Jews do not accept the divinity of Jesus.

> "... under no circumstances would Jews ever consider the Lord's Prayer to be any but a Christian prayer. Whereas it is true that the ideas and the words are taken from Jewish tradition, nevertheless, the form in which it is recited, the status attached to it and the associations it recalls are part of the Christian and not the Jewish tradition. The very title is Christian, "the Lord's" referring to Jesus and not to God as Jews conceive Him. *Statement* of Reform

Judaism[5] submitted by Rabbi Richard G. Hirsch to the Senate Judiciary Committee, October 3, 1962, *Congressional Record* (October 5, 1962) A7318, A7319.

As a Christian prayer, the Lord's Prayer would likewise be unacceptable as a form of worship to other non-Christian religions.

"Prayer is always worship." *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 339 (1910); Prayer "is a solemn avowal of divine faith and supplication for the blessings of the Almighty," *Engel v. Vitale*, 370 U. S. 421, 424 (1962); it is the most fundamental expression of religious faith.[6] Therefore, it is not surprising that the history of mankind is replete with conflicts over the forms and content of this religious ceremony. See *Engel v. Vitale*, *supra*, footnotes 5-8, at 426, 427.

In view of the foregoing, it is clear that an opening exercise in the public schools which includes the recitation by the students of the Lord's Prayer is a devotional exercise, an act of worship, a religious ceremony and, in addition, a characteristically Christian service.

---

5. Reform Judaism is one of the three major branches of the Jewish faith; the others are Conservative Judaism and Orthodox Judaism.

6. "The Talmud, commenting on Deut. 11:13, described prayer "as the 'divine service of the heart.' It is often regarded as superior to all sacrifices. God loves prayer, especially that of the pious man; but it must be performed in the right spirit, not as a fixed task that has to be done, but as a fervent pouring out of the soul of the pious man which comes from the heart which is truly moved. The worshipper must feel that he is standing in holy awe before the majesty of God * * * One should hasten upon prayer in the spirit of deepest humility and holy reverence, and one should pray only when one has a longing to do so in one's own heart and is attuned to it by reason of a devotional mood." *8 Universal Jewish Encyclopedia* 618 [Talmudic references omitted].

**B. Reading of a chapter or ten verses of the Holy Bible**

The Holy Bible is a designation used by Christians. Jews refer to their Book as Holy Scriptures. To Christians the Holy Bible is a book consisting of two parts called "Old Testament" and "New Testament." The source of the Old Testament is Jewish Holy Scriptures, which antedate the Christian era. The New Testament consists of books and epistles written by the apostles who put the teachings of the new Christian religion into written form.

The Holy Bible, as described above, is regarded by Christians as the Word of God. Moore, George Foot, *History of Religions*, Charles Scribner's Sons, New York (1947) Vol. II, 368, 371; *Columbia Encyclopedia* 197 (2nd ed., 1950); 11 *Catholic Encyclopedia* 543 (1913 ed.); *Holy Bible*, Preface (Gideons' ed.); *People ex rel. Ring v. Board of Education*, *supra*, at 343.

The first complete translation of the Holy Bible into English was made by John Wycliffe at the end of the Fourteenth Century. 3 *Encyclopedia Britannica* 531 (1959 ed.). Of numerous subsequent translations two are particularly significant for these cases: The King James, or Protestant version, and the Douay or authorized Roman Catholic version. These two versions differ not only as one might expect two different translations of the same text to vary, but also with respect to the parts or books which are included. For example, the two books of the Maccabees, the books of Judith, Tobias and Baruch are included in the Douay version but excluded from the King James version.[7]

---

7. These books are considered part of the Apocrypha. None of these books, although authored by Jews, is contained in the Jewish Scriptures. 1 Universal Jewish Encyclopedia 422, 2 Encyclopedia Britannica 105 (1959 ed.).

The name "Old Testament" is not used by Jews to describe their Holy Scriptures or any part thereof; that name was given to the Hebrew Scriptures by the Christians because they regarded the New Testament as the completion and perfection of the earlier Scriptures. The Jews do not accept any part of the New Testament as revelation. Nor do they accept the King James or the Douay versions of the Old Testament but use the Hebrew text of their Scriptures handed down by tradition (Mesoretic Text), or approved translations into English from the Mesoretic Text. 2 Universal Jewish Encyclopedia 280-282. As to the sectarian character of the Christian Holy Bible from the point of view of Jews, see *People ex rel. Ring* v. *Board of Education*, *supra*, at 347-8; *Herold* v. *Parish Board of School Directors*, 136 La. 1034, 1047 ff. (1915); *Tudor* v. *Board of Education of Rutherford*, 14 N. J. 31, 46 (1953).

The differences between the Protestant and Catholic versions of the Lord's Prayer have already been noted.

Disputes concerning the Holy Bible during the 14th and 15th Centuries and at the time of the Reformation arose over the question of whether the Bible should be translated into the languages spoken by the people at that time. The remains of John Wycliffe, who translated the Bible from Latin into English, were ordered exhumed and burned. 23 *Encyclopedia Britannica* 821-4 (1959 ed.).

William Tyndale, who translated the Bible from Hebrew and Greek into the vernacular in the early 16th Century, was driven out of England during the reign of Henry VIII and hunted by the Inquisition until caught in 1536, tried for heresy and condemned. He was strangled and burned at the stake in Velvorde, Belgium. 22 *Encyclopedia Britannica* 642-3 (1959 ed.).

When it was finally accepted among Christians that the Bible should be taught to the people in their own language, controversy over the Bible continued, but the question now was over the correct version or translation. As mentioned above, in England the Protestants adopted the King James version, the Roman Catholics the Douay version. The Jews retained their Holy Scriptures in the Hebrew form that was transmitted from generation to generation and in various translations into the vernacular languages.[8]

Similar religious controversies over the Bible occurred in the history of our country. If one well-known case—Philadelphia in 1844—community conflict over which version of the Bible should be read in the public schools led to riots, church burnings and loss of life. Billington, Ray Allen, *The Protestant Crusade, 1800-1860*, Macmillan Co., New York (1938) 220-234.

The earliest cases in the state courts challenging Bible-reading in the public schools were instituted by Roman Catholic parents who objected to the use of the King James version. *Donahoe* v. *Richards*, 38 Me. 379 (1854); *Board of Education of Cincinnati* v. *Minor*, 23 Ohio St. 211 (1872); *McCormick* v. *Burt*, 95 Ill. 263 (1880); *Moore* v. *Monroe*, 64 Iowa 367 (1884); *State ex rel. Weiss* v. *District Board*, 76 Wis. 177 (1890); *Pfeiffer* v. *Board of Education*, 118 Mich. 560 (1898); *Billard* v. *Board of Education*, 69 Kan. 53 (1904); *Hackett* v. *Brooksville Graded School District*, 120 Ky. 608 (1905). See also Stokes, Anson Phelps, *Church and State in the United States*, Vol. II, 550, 566, Harper, New York (1950). In some later cases Jewish

8. The translation of the Jewish Holy Scriptures from the Hebrew into other languages, such as Aramaic, Greek, Arabic, Yiddish, German, English, etc., never presented a theological problem for Jews.

petitioners joined with Roman Catholics in challenging the use of the King James version of the Bible for opening exercises in the public schools. *People ex rel. Ring* v. *Board of Education, supra; Herold* v. *Parish Board of School Directors, supra; Doremus* v. *Board of Education, supra.*

A distinction must be drawn between reading selected portions of the Bible as part of a devotional or inspirational exercise at the beginning of the public school day and the use of the Bible in the context of instruction in such subjects as literature, art, history and social studies. The Bible has a monumental place as a classic in world literature. There can be no meaningful instruction in the development of the literature of Western Civilization without recognition of the Bible, as well as other classics, such as the Iliad and the Odyssey, Beowulf, the Edda, the Nibelungenlied and the Song of Roland. In addition, the Bible, even more so than the other classics, is indispensable for the understanding and appreciation of innumerable artistic and literary works. The Bible is probably the most frequently cited document.

> The language of the Bible, now simple and direct in its homely vigour, now sonorous and stately in its richness, has placed its indelible stamp upon our best writers from Bacon to Lincoln and even to the present day. Without it there would be no Paradise Lost, no Samson Agonistes, no Pilgrim's Progress; no William Blake, or Whittier, or T. S. Eliot as we know them; no Emerson or Thoreau, no Negro Spirituals, no Address at Gettysburg. Without it the words of Burke and Washington, Patrick Henry and Winston Churchill would miss alike their eloquence and their meaning. Chase, Mary Ellen, *The Bible and the Common Reader*, Macmillan Company, New York (1945) 9.

Similarly, the Bible is a source book of history. Many of the events that occurred in the early civilizations in the Middle East, particularly in The Holy Land, are reflected in the Bible. In recent years, numerous archeological discoveries, including the Dead Sea Scrolls, have tended to verify the authenticity of many of the stories recorded in the Bible. Albright, William Foxwell, *Archaeology and the Religion of Israel*, Johns Hopkins Press, Baltimore (1946); Burrows, Millar, *The Dead Sea Scrolls*, Viking Press, New York (1955), 326 ff.; Gaster, Theodor H., *The Dead Sea Scriptures*, Doubleday, New York (1956) 12 ff.; Allegro, John M., *The Dead Sea Scrolls*, Penguin Books, Ltd., Harmondsworth, England (1959 ed.) ch. 4.

The cases at bar, however, do not involve the use of the Bible for literary, historical, art appreciation or other non-religious purposes. The petitioners in the courts below did not contest such use of the Bible in classroom instruction. They challenged the requirement of Bible-reading in the public schools for devotional and inspirational purposes on the ground that such use was religious and sectarian. In other words, they challenged the required use of the Bible in the public schools as a book of worship.

The religious character of the Bible-reading ceremony involved in these cases is apparent from an examination of the circumstances surrounding the exercise.

It is part of an "opening exercise" which has a very special status in the school regimen. Such exercises are conducted in the home room or in the school assembly prior to the beginning of the regular periods of instruction in the various subjects which compose the school curriculum. The opening exercise, if in the classroom, is presided over by the home room teacher or, if in the assembly, by the

principal or his deputy. Neither presiding official is necessarily a literature or history teacher qualified to teach the literary or historical aspects of the Bible. This makes it clear that the reading of a portion of the Holy Bible as part of the opening exercise is not instruction in literature or history.

The special status and significance of the use of the Bible in the opening exercise is evidenced by the fact that in one case a state statute and in the other a board of education regulation expressly specify the Holy Bible as the document to be used. No other literary or historical work is or may be used as part of the opening exercise; "secular subjects are not usually taught in opening exercises." *State ex rel. Finger* v. *Weedman*, 55 S. D. 343, 355 (1929).

In both cases the reading from the Holy Bible is required to be "without comment." The prohibition of comment is a recognition of the religiously sensitive character of the material used in the opening exercise. That requirement refutes the argument that the Bible is there being used for literary or historical instruction. Implicit in instruction in our public schools is the role of the teacher in analyzing, explaining, evaluating and commenting upon the material used in the classroom. We know of no precedent for a prohibition against comment by the teacher in connection with the use of literary or historical source materials when such materials are used for instructional purposes. *State ex rel. Finger* v. *Weedman*, *supra*, at 346, 357.

Another indication of the religious character of the Bible-reading exercise is the association of the practice in both cases with the recitation of the Lord's Prayer. Bible-reading and recitation of the Lord's Prayer have

often been combined as part of the opening exercise in public schools. See: *Billard* v. *Board of Education, supra; Hackett* v. *Brooksville Graded School District, supra; Church* v. *Bullock*, 104 Tex. 1 (1908); *People ex rel. Ring* v. *Board of Education, supra; Herold* v. *Parish Board of School Directors, supra; Doremus* v. *Board of Education, supra; Carden* v. *Bland*, 199 Tenn. 665 (1956); *Chamberlin* v. *Dade County Board of Public Instruction*, 142 So. 2d (Fla.) 21 (1962).

Both in Baltimore and in Pennsylvania provision is made for the excuse of any child whose parent or guardian objects to his participation in the opening exercise. That provision is meaningful only if the exercise is intended as a religious ceremony. It is significant that the original Pennsylvania statute, 24 P. S. Pa. Sec. 15-1516, had no provision for the excuse of an objecting child when the *Abington* case was instituted. It was only after the Federal District Court for the Eastern District of Pennsylvania had held the statute unconstitutional under the First Amendment, *Schempp* v. *School District of Abington Township*, 177 F. Supp. 398 (1959), that the Legislature sought to cure the constitutional defect by amending the statute to provide for the excuse of an objecting child. 24 P. S. Pa. Sec. 15-1516 (Supp. 1960). Similarly, the Baltimore school regulation was amended to provide expressly for the excuse of an objecting child in order to comply with an opinion rendered by the Attorney General of Maryland following a protest by the petitioners below. *Murray* v. *Curlett, supra*, at 242. That history of the current Pennsylvania statute and Baltimore school board regulation serves to strengthen the conclusion that the Bible-reading exercise is recognized as a religious ceremony which some

children may be expected to find objectionable on grounds of conscience.

The Baltimore regulation, in addition to permitting the excuse of objecting children, provides that "the Douay version [of the Holy Bible] may be used by those pupils who prefer it." Rules of the Board, Art. VI, Sec. 6. The obvious purpose of that provision is to accommodate those Roman Catholic children who have religious objections to participation in any religious ceremony involving the use of a version of the Holy Bible which lacks the imprimatur of their Church.[9] The regulation fails, however, to make similar provision for those children who may not accept either the King James or Douay version of the Holy Bible.

Those who sponsor Bible-reading and prayer in the public schools would be the first to acknowledge that the Holy Bible is selected for the opening exercises for the very purpose of bringing religious content into the daily program of the public schools and thereby helping to counteract what they characterize as the "Godless" atmosphere in the public schools. *State ex rel. Finger* v. *Weedman*, *supra* 352; Will, A. S. *Life of Cardinal Gibbons*. Dutton & Co., New York (1922), Vol. I, p. 478.

To summarize, daily reading from the Holy Bible as part of the opening exercise in the public schools is a religious and devotional ceremony. It is also a sectarian ceremony. It is sectarian as between Christians and non-Christians because the Holy Bible is a Christian document. It is also sectarian as between Roman Catholics and Protestants because each such religious group accepts different versions of the Bible as authorized.

9. It is difficult to comprehend how that provision solves the problem of one religious group's being exposed to the reading of a version of the Holy Bible unacceptable to it, unless the Protestant and Catholic children are physically separated in different classrooms during the opening exercise.

## POINT II

**Religious and sectarian practices in the public schools violate the constitutional prohibition against an establishment of religion.**

### A. The establishment of religion clause of the First Amendment

The First Amendment to the United States Constitution provides, in part, as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *

This provision against action by Congress has been held equally applicable to action by the states or any of their political subdivisions. *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943).

The minimum meaning of the Establishment Clause has been spelled out by this Court in *Everson v. Board of Education* 330 U. S. 1 (1947) as follows:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No

> tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." *Id.*, at 15-16.

The majority and minority in *Everson* agreed upon that definition. This Court noted such agreement in *McCollum* v. *Board of Education*, 333 U. S. 203, 210-211 (1948) and in *Torcaso* v. *Watkins*, 367 U. S. 488, 492-493 (1961). Whether or not that definition of the Establishment Clause was *obiter dictum* in *Everson*, it indisputably became the *ratio decidendi* in *McCollum*, as acknowledged by this Court's opinion in *Torcaso*. That definition of establishment was reaffirmed in the opinion of the Chief Justice in *McGowan* v. *Maryland*, 366 U. S. 420, 443 (1961), and by the unanimous opinion of this Court in *Torcaso*, *supra*, at 492-3.[10]

In *McCollum* this Court struck down as a violation of the Establishment Clause a program involving religious education in the public schools of Champaign, Illinois. Under that program, children attending public schools whose parents so requested were released for a thirty or forty-five minute period each week, during the regular school time, to receive religious instruction from sectarian teachers. Such classes were conducted in the regular classrooms of the public school buildings. Students whose parents di

10. Sixteen Justices of this Court since 1947 have subscribed to that definition of the Establishment Clause; not a single Justice since that date has challenged that definition.

not wish them to participate in the religious instruction were not required or permitted to remain in the classrooms where such instruction took place. Instead, they were assigned to other places in the public school buildings for the pursuit of their secular studies. *McCollum v. Board of Education, supra*, at 207-209.

This Court held that Champaign program unconstitutional under the Establishment Clause of the First Amendment. The Court concluded that "the foregoing facts * * * show the use of tax-supported property for religious instruction * * *." *Id.*, at 209. Such use of "tax-supported property" was a violation of the prohibition against laws "which aid one religion, aid all religions, or prefer one religion over another."

*Engel v. Vitale, supra*, is the other case in which this Court dealt with the constitutionality of religious practices in the public schools.

There a group of parents of children attending the public schools of New Hyde Park, New York, challenged the constitutionality of a board of education regulation requiring the daily recitation of a "non-denominational" prayer as part of the opening exercise. The prayer had been composed and recommended to the local school authorities by the Board of Regents which supervises the educational system of the state. When that case reached this Court, provision had been made by school-board regulation for the excuse of any child whose parent or guardian objected to his participation in the prayer.

This Court recognized that the Regents' prayer was "religious activity * * * a solemn avowal of divine faith and supplication for the blessings of the Almighty." *Engel v. Vitale, supra*, at 424. Hence this Court held that state or federal governments, under the Establishment Clause, are

"without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." *Id.*, at 430.

After reviewing religious controversies in England and the United States over forms of prayer, Mr. Justice Black, in his opinion for the Court, said that the "Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Id.*, at 431, 432. Therefore, all political subdivisions of our government, state or federal, were directed to "stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Id.*, at 435.

This Court has on a number of occasions made it clear that separation between church and state as required by the Establishment Clause is not a manifestation of an anti religious attitude on the part of our society. In *Engel* this Court said: "Nothing, of course, could be more wrong" than to argue "that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer." *Engel* v. *Vitale*, *supra*, at 433, 434. In *Torcaso*, this Court cited Mr. Justice Frankfurter's concurring opinion in *McCollum*, where he said that "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion." *Torcaso* v. *Watkins*, *supra*, at 494. See also *McCollum* v. *Board of Education*, *supra*, at 232; *Everson* v. *Board of Education*,

*supra*, at 59 (dissenting opinion). The Court's opinion in *McCollum* said that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum* v. *Board of Education*, *supra*, at 212.[11]

### B. Bible-reading and the recitation of the Lord's Prayer in opening school exercises as an establishment of religion

We have shown that Bible-reading and the recitation of the Lord's Prayer as part of the opening exercises in the public schools of Baltimore and Pennsylvania are religious devotional ceremonies. As such they are barred by *Engel*.

A comparison of the principal features of the ceremony involved in *Engel* with those involved in the instant cases establishes the striking similarity between the programs. The common features may be listed as follows:

11. This understanding of the Establishment Clause by the Court has been echoed in editorials in the general press. See: Chicago *Sun-Times*, June 27, 1962; Hartford *Courant*, June 28, 1962; New York *Times*, June 27, 1962; New York *Herald Tribune*, June 27, 1962; St. Louis *Post-Dispatch*, June 28, 1962; Washington *Post*, June 26, 1962; Wilmington *Morning News*, June 27, 1962; Milwaukee *Journal*, June 28, 1962; Pittsburgh *Post-Gazette*, June 27, 1962; Louisville *Courier-Journal*, June 27, 1962; *Christian Science Monitor*, June 27, 1962; Salt Lake *Tribune*, June 28, 1962; Helena *Independent Record*, June 29, 1962; York (Pa.) *Gazette and Daily*, July 2, 1962. See also editorials in religious publications: *The Christian Century*, July 18, 1962, p. 882, August 1, 1962, pp. 934-36; *Concern* (General Board of Christian Social Concerns of the Methodist Church), August 1, 1962, pp. 3-4; *Commonweal*, July 13, 1962, p. 387; *The Church World* (Roman Catholic Diocesan newspaper of Portland, Me.), July 7, 1962, editorial; *The Churchman*, August 1962, p. 4; *The Ethical Outlook*, Sept.-Oct. 1962, p. 149; *The Catholic Reporter* (Kansas City, Mo.), July 13, 1962, editorial. See also *Statement* of Commission on Social Action of Reform Judaism, *Congressional Record*, October 5, 1962, pp. A7318, A7319.

a. Required by statute or regulation promulgated by state authority.

b. Religious ceremony.

c. Part of the daily opening exercise in the public schools.

d. Prohibition against comment by school authorities.

e. Provision for the excuse of children who object on grounds of conscience.

In addition to these common features, the cases at bar involve religious practices which, as we have shown, are clearly sectarian. By reason of this sectarian feature, the practices involved in these cases run afoul, not only of *Engel*, but also of that express principle enunciated in *McCollum* that government may not "aid one religion . . . or prefer one religion over another." *McCollum* v. *Board of Education*, *supra*, at 210. To put it another way, when the state directed the use of a sectarian ceremony in the public schools, it abandoned that neutrality which this Court held must be maintained "when it comes to competition between sects." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). See also *Tudor* v. *Board of Education of Rutherford*, *supra*.

Conceding that the various standard versions and translations of the Old Testament contain passages which do not create doctrinal difficulties for Protestants, Catholics or Jews,[12] there is nothing in the Baltimore regulation or the

12. There are, however, passages in the Old Testament which, in translation, reflect doctrinal differences in the various texts, *e.g.*, Isaiah 7, 14. The Hebrew word, הָעַלְמָה (*ha-almah*), is translated in the English text of the Jewish Holy Scriptures (*Soncino Books of the Bible*: Soncino Press, London, 1949) as "the young

Pennsylvania statute which limits the teacher to selections from the Old Testament.[13] Hence, a teacher could select for daily reading passages from the New Testament which are clearly sectarian from the Jewish point of view.

> To permit the teacher to select the part of the Bible to be read without test wherein to determine the selection is to allow any part, or all parts, to be selected. *Herold* v. *Parish Board of School Directors*, *supra*, at 1049.

Therefore, if the recitation of the Lord's Prayer is proscribed as a sectarian religious act, so long as reading selections from the Holy Bible is permitted and no limitation imposed upon the teacher concerning the choice of passages to be read, the teacher could conceivably select for daily reading the Lord's Prayer, which appears in two books of the New Testament.[14]

This Court recently reiterated the constitutional requirement of government neutrality in this field in *Torcaso* v. *Watkins*, *supra*, when it held unconstitutional a Mary-

---

woman" whereas in the King James version it appears as "a virgin" and is cross-indexed to those verses in the Gospel according to St. Matthew which describe the conception of Jesus by the Virgin Mary. Matt. 1, 23. Thus, the verse "Thereupon the Lord himself shall give you a sign: Behold, a virgin shall conceive, and bear a son, and shall call his name Immanuel" is interpreted in the Christian Old Testament as foretelling the coming of Christ.

13. In this respect these cases differ from *Doremus* v. *Board of Education*, *supra*, where the New Jersey statute expressly limited the Bible-reading to selections from the Old Testament.

14. On the other hand, for the state, through its legislative, judicial or executive branch, to undertake to select which passages of the Holy Bible are non-sectarian and hence appropriate for use in the public schools, would thrust the state into the whirlpool of religious conflict and dispute, the very thing the Establishment Clause was intended to avoid.

land requirement that applicants for public office swear to a belief in God." The unanimous opinion in that case made it clear that government in this country could not aid or prefer "religions based on a belief in the existence of God as against religions founded on different beliefs" or as against "non-believers." *Id.*, at 495. Hence *Torcaso* is another authority against the constitutionality of religious practices in the public schools which tend to favor certain religions.

This Court's opinion in *Engel* made it clear that under the First Amendment's prohibition against governmental establishment of religion, "government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer . . ." *Engel* v. *Vitale*, *supra*, at 430.

When agencies of the states select and approve a specific prayer and a basic religious document and direct that they be used in a religious ceremony in the public schools, the states just as effectively "prescribe" and "sanction" the form of religious service as when they compose the text to be used in such ceremony, as the New York Board of Regents did in *Engel*. This conclusion finds unequivocal support in the language in this Court's opinion in *Engel*, where it stated that the business of government in this country does not include "writing or sanctioning" official prayers. *Id.*, at 435. Whether the state authority writes the prayer for use in the public schools, as it did in *Engel*, or selects portions of an existing religious document for use as part of the opening exercise, as it did in Baltimore and Pennsylvania, is constitutionally immaterial. In both instances the public authorities "prescribe" and "sanction" the religious documents which are to be used

in the opening exercise. In both instances we are faced with the establishment of a practice "as an officially approved religious doctrine." *Id.*, at 436.

Furthermore, it can hardly be denied that the public schools in both cases at bar are financing a religious exercise. The teacher or supervisor who leads the class or assembly in the opening exercise is on the public payroll and the time taken with the religious ceremony here in issue is certainly equal to if not in excess of the time taken to recite the 22-word prayer struck down in *Engel*. Thus, as in *Engel*, we have a use of tax funds, small as it may be, to support religious activities. *Everson* v. *Board of Education*, *supra*, at 16; *McCollum* v. *Board of Education*, *supra*, at 210; *Engel* v. *Vitale*, *supra*, Mr. Justice Douglas concurring, at 441.

Whatever the derivation of the religious ceremony, once it has been shown to be a religious activity carried on in the public schools under the sponsorship of public authorities, it is aid to religion and hence banned by the Establishment Clause. *McCollum* v. *Board of Education*, *supra*, at 210; *Torcaso* v. *Watkins*, *supra*, at 492-493.

Another constitutional objection to the ceremony here challenged is that the opening exercise of which it is a part and which is under the guidance and control of the public school teacher or principal, blends secular (Pledge of Allegiance) and religious (Bible-reading and the Lord's Prayer) programs, a combination condemned in *Zorach* v. *Clauson*, *supra* at 314.

### C. The impact of the Sunday Closing Law decisions

On May 29, 1961 this Court ruled on the constitutionality of several state statutes prohibiting certain business and labor activities on Sunday. The statutes were attacked as unconstitutional under the First and Fourteenth Amendments. One of the grounds urged upon this Court was that the acts were religious legislation and hence constituted an establishment of religion.

The Chief Justice, speaking for the Court in *McGowan v. Maryland*, *supra*, conceded that the Sunday closing laws were religious in their origin. He held, however, that they had lost their religious character, had become secular legislation, and therefore "presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States." *Id.*, at 444. He added that Sunday legislation would violate the Establishment Clause if it could be "demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion." *Id.*, at 453.[15]

To meet the test spelled out by the Chief Justice in *McGowan*, it would be necessary to argue that the daily reading of the Holy Bible and recitation of the Lord's Prayer as part of the opening exercise in the public schools have neither a religious "purpose" nor a religious "effect" a conclusion clearly irreconcilable with the fact that the Lord's Prayer is an invocation to the Supreme Being and the Holy Bible is regarded as the Word of God by those who sponsor its use in the public schools.

15 See also *Gallagher v. Crown Kosher Super Market*, 366 U. S. 610, 630, and *Braunfeld v. Brown*, 366 U. S. 599, 607.

**D. The program is unconstitutional even though objecting children may be excused.**

This Court has recognized a distinction between the Establishment Clause and the Free Exercise Clause of the First Amendment. *Engel* v. *Vitale*, *supra*, at 430; *McGowan* v. *Maryland*, *supra*, at 430. This difference is particularly striking when we consider the constitutional effect of a provision in the statute or school board regulation for the non-participation of objecting pupils. It may be argued that permission for non-participation makes a religious program unobjectionable from the point of view of the free exercise of religion. However, the presence or absence of compulsory attendance is irrelevant in any discussion of the constitutionality of a program under the Establishment Clause. *Engel* v. *Vitale*, *Ibid.* This clause of the First Amendment prohibits any agency of the state from undertaking or sponsoring religious programs, and it is of no moment that all or some of the citizens participate in such programs. Clearly, the holding of a Mass or a "Youth for Christ" revival meeting in a public school during the regular day would violate the Establishment Clause, even though all children who objected on religious grounds were permitted or even required to absent themselves.

One objection to including religious prayers and recitals in the opening school exercises, notwithstanding provision for non-participation, is the fact that "the power, prestige and financial support of government is placed behind a particular religious belief." *Engel* v. *Vitale*, *supra*, at 431. This has the effect of an "indirect coercive pressure upon religious minorities to conform to the prevailing, officially approved religion . . . ." *Ibid.* See also, *McGowan* v. *Maryland*, *supra*, at 452; Mr. Justice Frankfurter's con-

curring opinion in *McCollum, supra*, at 230; and *Tudor* v. *Board of Education of Rutherford, supra*, at 51.

The non-participating children are inevitably set apart as non-conformists and subjected to social and psychological pressures to modify or repudiate the religious beliefs and conduct they are taught in their homes and religious institutions. The choices open to the non-participating child are both bad: he may ask to be excused and hence label himself as a non-conformist to his peers; he may yield to the pressure and participate in the exercise although it conflicts with his beliefs.

It is a well known fact that young children of public school age are peculiarly susceptible to the coercion implicit in the teacher's role as the director and supervisor of the opening exercise. *McCollum* v. *Board of Education, supra*, Mr. Justice Frankfurter concurring, at 227. It would be a rare child, indeed, who would have the courage to question the propriety of the religious content of the opening exercise.

The dilemma in which the child is thus placed is not of his own creation; it is created for him by the state authorities who elect to include a religious exercise in the public school program. To consider the "obvious pressure" thus exerted upon public school children as beyond the Court's cognizance, is "to draw a thread from a fabric." It fails to accept the fact that the public school authorities, by deliberately introducing a religious exercise, are responsible for imposing the dilemma upon children who have been committed to their care solely for secular education. *Ibid.*

Several state courts, when called upon to consider various religious practices in the public schools, like this Court

have held that provision for non-participation did not save a school-sponsored religious program from invalidity under state constitutional provisions which had the same objective as the First Amendment. *People ex rel. Ring v. Board of Education, supra*, at 351; *State ex rel. Weiss v. District Board, supra*, at 219, 220; *Herold v. Parish Board of School Directors, supra*, at 1049-1050.

As was mentioned earlier in this brief, the Baltimore regulation and the Pennsylvania statute here in question originally did not provide for the excuse of an objecting child and were amended expressly to make such provision only after the petitioners below challenged the exercises. In *Engel v. Vitale* also, the original board of education regulation neglected to provide for such excuse and was later amended at the direction of the trial court to include the excuse provision. *Engel v. Vitale*, 18 Misc. 2d 659, 694 (1959). Just as the amendment failed to save the regulation under the Establishment Clause in *Engel*, so do the amendments fail to save the regulation and statute in the instant cases.

### E. Various religious practices not involving public schools are not legal precedents for these cases.

The Court of Appeals of Maryland, in its majority opinion below, referred to opening prayers at state and federal legislative sessions in public meetings and conventions and to the invocation of God at court openings to buttress its conclusion that the First Amendment does not exclude prayer and Bible-reading from opening exercises in public schools. *Murray v. Curlett, supra*, at 247.

It should be noted that none of the traditional practices cited by the Maryland Court of Appeals relates to the area

of public school education which involves young and impressionable children. It cannot be argued, for example, that the employment of chaplains by the Congress is authority for the employment of chaplains by the public schools. Furthermore, none of the practices cited by the Maryland Court of Appeals has been subjected to authoritative judicial scrutiny. See *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923).

In *Engel* v. *Vitale*, this Court dealt with the same argument made to defend the constitutionality of the Regents' Prayer which was required to be recited in the public schools of New Hyde Park. The Court distinguished such "manifestations in our public life of belief in God" from religious practices mandated by public school authorities. It said: "Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." *Engel* v. *Vitale*, *supra*, at 435, note 21.

### F. State court decisions upholding Bible-reading or recitation of the Lord's Prayer in public schools

Elsewhere in this brief we have referred to a number of decisions of the highest courts of the states which held Bible-reading in the public schools, with or without the recitation of the Lord's Prayer, to be unconstitutional. *State ex rel. Weiss* v. *District Board*, *supra*; *People ex rel. Ring* v. *Board of Education*, *supra*; *Herold* v. *Parish Board of School Directors*, *supra*; *State ex rel. Finger* v. *Weedman*, *supra*. We are aware, however, that other state courts dealing with the same question have held otherwise, and the prevailing opinion of the Maryland Court of Appeals in *Murray* v. *Curlett* relied on such decisions. *Id.*, at

249. The overwhelming majority of those cases was decided on the basis of the state constitutional provisions guaranteeing freedom of religion.[16] They were also decided before this Court had firmly established that the First Amendment's Establishment Clause was binding upon the states through the Fourteenth Amendment.

Nonetheless, since the bills of rights of many state constitutions are modelled after the Federal Bill of Rights, an examination of the reasoning used in the state court decisions is in order.

The decisions upholding the constitutionality of Bible reading and recitation of the Lord's Prayer in the public schools are based on dubious grounds which may be listed as follows:

1. The Bible is an essential source of literary and historical knowledge and hence may not be excluded from the public schools. *People ex rel. Vollmay* v. *Stanley*, 81 Colo. 276, 289, 290 (1927); *Kaplan* v. *School District*, 171 Minn. 142, 150, 151 (1927); *Donahoe* v. *Richards*, *supra*, at 399; *Lewis* v. *Board of Education*, 157 Misc. (N. Y.) 520, 530 (1935) appeal dismissed 270 N. Y. 490 (1937).

The use of the Bible in the public schools for literary or historical instruction is not questioned in the cases at bar. Reading, without comment of a chapter or ten verses of the Bible, with or without the recitation of the Lord's Prayer, as part of the opening exercise, is not instruction

16. But see *Doremus* v. *Board of Education*, *supra*, and *Carden* v. *Bland*, *supra*. See also *Chamberlin* v. *Dade County Board of Public Instruction*, *supra*, where the Supreme Court of Florida expressly refused to accept this Court's interpretation of the Establishment Clause

in literature or history; it is a religious rite mandated by state authorities and hence prohibited by the Establishment Clause.

2. The mere reading of short sections of the Bible and the recitation of the Lord's Prayer, without response, comment or remark, is not objectionable because there is no effort on the part of the teacher to inculcate religious dogma. *Billard* v. *Board of Education*, *supra*, at 58; *Wilkerson* v. *City of Rome*, 152 Ga. 763, 77- 774 (1921).

The religious nature of the exercise is determined by its form and content; whether the words are actually uttered by the teacher or the student is immaterial. Furthermore, this reasoning ignores the special role of the teacher. The mere reading of religious passages and prayers by the person to whom the pupils have been taught to look as authority, in the atmosphere of reverence which the public schools seek to achieve during the opening exercise, is tantamount to religious instruction or indoctrination.

3. A brief period of reverence or a simple act of spiritual devotion is not "worship." *Carden* v. *Bland*, *supra*, at 674.

The Establishment Clause prohibits state-sponsored religious exercises in public schools whether they are long or short. The use of the Holy Bible or of the Lord's Prayer in such exercises establishes their religious nature. A similar argument based on the brevity of the Regents' prayer was rejected in *Engel* v. *Vitale*, *supra*, at 436.

4. P ers are traditional in public functions, such as legislati sessions, court invocations and public meetings.

*Carden* v. *Bland*, *supra*, at 681; *Church* v. *Bullock*, *supra*, at 7; *Doremus* v. *Board of Education*, *supra*, at 442.

We have dealt with this argument in this brief at pp. 35-36, *supra*.

5. Bible-reading and recitation of the Lord's Prayer in the public schools are not sectarian practices; the term "sectarian" is limited to differences among "the various sects of Christianity." *People ex rel. Vollmar* v. *Stanley*, *supra*, at 288; *Hackett* v. *Brooksville Graded School District*, *supra*, at 617; *Doremus* v. *Board of Education*, *supra*, at 448; *Lewis* v. *Board of Education*, *supra*, at 530.

This definition of "sectarianism" is meaningless in terms of constitutional law. Implicit in it is the assumption that Christianity is established in the United States and that if a practice is acceptable to Christians it is constitutional. The argument also ignores the fact that Protestants and Roman Catholics accept different versions of the Holy Bible and the Lord's Prayer as well as the fact that Jews do not accept the Christian Holy Bible or the Lord's Prayer. In addition, it ignores the existence of other, non-Christian religions and of non-theistic religions. It treats as non-existent that substantial segment of the population that regards itself as religiously unaffiliated. See *Torcaso* v. *Watkins*, *supra*.

In any event, the criterion which a public school practice must satisfy to survive a constitutional challenge under the Establishment Clause is not merely the absence of sectarianism or denominationalism, but the absence of anything which makes the practice a "governmentally sponsored religious activity." *Engel* v. *Vitale*, *supra*, at 430.

6. The practice of reading from the Holy Bible and reciting the Lord's Prayer in the public schools reflects the religious commitment of the majority of our people which the minority religious groups must accept. *Donahoe v. Richards, supra*, at 409; *Pfeiffer v. Board of Education, supra*, at 566; *Church v. Bullock, supra*, at 8; *Wilkerson v. City of Rome, supra*, at 780, 781; *Doremus v. Board of Education, supra*, at 448.

The Constitution makes no distinction between religious minorities and majorities. In fact, the Bill of Rights protects rights of the individual against the state, not the rights of minorities against majorities or *vice versa*. The Establishments Clause which prohibits "laws which aid one religion, aid all religions, or prefer one religion over another," does not differentiate between majority and minority religions. *McCollum v. Board of Education, supra*, at 210; *Torcaso v. Watkins, supra*, at 493.

The majority-minority argument assumes that a large number of adherents can give a preferred status to one religion over another and that instrumentalities of the state may take cognizance of the numerical strength of different religious groups. This is an untenable doctrine which has been rejected time and again by this Court. *Niemotko v. Maryland*, 340 U. S. 268, 272, 273 (1951); *Fowler v. Rhode Island*, 345 U. S. 67, 69, 70 (1953); see also *Torcaso v. Watkins, supra*.

7. No one's freedom of religion is or can be violated so long as an objecting child upon request is excused from participating in the ceremony. *Moore v. Monroe, supra*, at 370; *Doremus v. Board of Education, supra*, at 454; *People ex rel. Vollmay v. Stanley, supra* at 293; *Hackett v. Brooks-*

*ville Graded School*, *supra*, at 615; *Kaplan* v. *Independent School District*, *supra*, at 151; *Pfeiffer* v. *Board of Education*, *supra*, at 563.

We have dealt with this argument in this brief at pp. 33-35, *supra*. The fact that a child may, upon request, be excused from the observance of a religious rite in the public schools cannot serve to free it from the limitations of the Establishment Clause. *Engel* v. *Vitale*, *supra*, at 430.

8. Bible-reading and recitation of the Lord's Prayer as part of opening exercises have been traditional in the public schools. *Pfeiffer* v. *Board of Education*, *supra*, at 566; *Doremus* v. *Board of Education*, *supra*, at 452.

This contention can no more justify practices which are in violation of the First Amendment than the tradition of racial segregation in the South could save those practices from attack under the Equal Protection Clause of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

## Conclusion

Reading from the Holy Bible and the recitation of the Lord's Prayer, or either practice, required by the state as part of the opening exercise in the public schools, is an establishment of religion in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment. The decision of the United States District Court for the Eastern District of Pennsylvania in *School District of Abington Township* v. *Schempp*, declaring such requirement unconstitutional, should be affirmed, and the

decision of the Court of Appeals of Maryland in *Murray* v. *Curlett*, upholding such requirement, should be reversed.

Respectfully submittted,

MORRIS B. ABRAM
EDWIN J. LUKAS
New York, New York
*Attorneys for*
*American Jewish Committee*

BURNETT ROTH
Miami, Florida
ARNOLD FORSTER
New York, New York
*Attorneys for*
*Anti-Defamation League of B'nai B'rith*

*Amici Curiae*

PAUL HARTMAN
THEODORE LESKES
SOL RABKIN
New York, New York
*Of Counsel*

December 21, 1962